

Semachew (Migration) [2023] AATA 144 (18 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Eyrau Luel Semachew
VISA APPLICANT:	Mr Abebe Bezie Sisay
REPRESENTATIVE:	Ms Anna Emad (MARN: 1680386)
CASE NUMBER:	1835236
DIBP REFERENCE(S):	OSF2017/4828987 OSF2017024037
MEMBER:	Cheryl Cartwright
DATE:	18 January 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl 309.211 of Schedule 2 to the Regulations • cl 309.221 of Schedule 2 to the Regulations

Statement made on 18 January 2023 at 12:16pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – limited cohabitation – social acknowledgement of the relationship – sponsor’s visits to Sudan – emotional supported during physical separation – plans for work and English study – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 November 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 30 January 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211 because there was insufficient information to support the claim that the applicant was the spouse of the review applicant, the sponsor.
4. The review applicant appeared before the Tribunal on 12 January 2023. The Tribunal also received oral evidence from Mr Abebe Bezie Sisay, the visa applicant, and Ms Abeba Shedi, the mother of the review applicant.
5. The Tribunal hearing was conducted with the assistance of an interpreter in the Amharic and English languages.
6. The review applicant was represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether, at the time of application on 30 January 2017, the visa applicant, Mr Abebe Bezie Sisay, was the genuine spouse of the review applicant, Ms Eyrau Luel Semachew.
9. As Middleton J stated in *Jayasinghe v MIMA* [2006] FCA 1700 at [35]:
 10. Evidence of events subsequent to the visa application is relevant if it 'tends logically to show the existence or non-existence of facts relevant to the issue to be determined': see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.
11. In deciding this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application.
12. In the circumstances of this case, the Tribunal considers that it is appropriate to make findings about cl 309.221 (a time of decision criterion) as well.

13. Background

14. The review applicant is an Australian Permanent Resident who migrated to Australia with her family in 2010 from Sudan. The review applicant was born in Sudan; her parents were originally from Ethiopia.
15. The review applicant met the visa applicant, whose family is from Ethiopia, at a refugee school in Sudan. After the review applicant moved to Australia with her family, the visa applicant returned to Ethiopia.
16. The parties remained in touch and spoke about marriage in early January 2015. After the visa applicant had spoken with the review applicant's mother, Ms Abeba Shedi, and Ms Schedi had spoken with relatives in Ethiopia about his suitability, the review applicant agreed to marry the visa applicant in late January 2015.
17. The review applicant travelled to Ethiopia on 27 November 2015 and the parties were married on 18 January 2016. The review applicant remained in Ethiopia for two months then returned to Australia to work.
18. The review applicant returned in January 2020 and the parties lived together in Sudan until March 2021. She travelled again to Sudan in May 2022 and remained for one month trying to contact the visa applicant as war had broken out in Ethiopia. She was unable to contact him but was informed by friends that he was alive and he had escaped to a rural area.
19. The parties were able to resume contact in June 2022 and have remained in contact. The review applicant plans to visit the visa applicant early in 2023.

Whether the parties are in a spouse or de facto relationship

20. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian Permanent Resident. A copy of the review applicant's passport is on the Department's file.
21. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r 1.15A(3) is effectively a question which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 18 January 2016 in Bahir Dar City, Ethiopia. A copy of the marriage certificate is on the Department's file. On the evidence,

the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

- 23. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the persons' commitment to each other.
- 24. In considering these issues, the Tribunal has had regard to all the documents on the Department's file and the Tribunal's file.

25. The financial aspects of the relationship

- 26. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
- 27. There is no evidence before the Tribunal that, at the time of application or at the time of this decision, the parties jointly owned or own real estate or other major assets, that they had or have joint liabilities or that one person owed or owes any legal obligation in respect of the other.
- 28. At the Tribunal hearing the parties gave independent and consistent statements that they don't currently earn sufficient income to save as well as spend on travel and living costs and cover the costs associated with the visa application, but when living together they shared resources.
- 29. The Tribunal notes the lack of evidence about the financial aspects of the relationship provided to the Department and gives little weight to this lack of evidence.
- 30. The Tribunal gives some weight to the evidence provided to the hearing that the parties share responsibility for finances.

31. Nature of the household

- 32. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.
- 33. There is no evidence before the Tribunal that the parties have any children together. The review applicant told the Tribunal in a statutory declaration dated 16 November 2022 and at the hearing on 12 January 2023 that she had become pregnant in 2020 but had miscarried.
- 34. The parties told the Tribunal hearing that they lived together in Ethiopia for two to three months in 2015 and in Sudan for more than one year in 2020. The review applicant travelled to Sudan to search for the visa applicant in 2022. She was not able to enter Ethiopia and the communication network was down because of the war. The review applicant told the Tribunal that friends told her the visa applicant was alive because he had escaped to the countryside.
- 35. In a statutory declaration dated 16 November 2022, the review applicant stated that it is not traditional for men in their culture to assist with household duties so when they were living

with her grandmother in Khartoum and the visa applicant cooked breakfast it was treated as amusing.

36. The Tribunal notes the lack of evidence provided to the Department in relation to the nature of the household and gives this lack of evidence little weight.
37. The Tribunal notes the evidence provided by the review applicant's mother at the hearing on 12 January 2023 that the parties lived with her mother, the visa applicant's grandmother in 2020, in Khartoum and that her mother appreciated the visa applicant and believes he is a good husband.
38. The Tribunal gives some weight to the evidence provided at the hearing and in the review applicant's statutory declaration and accepts that, both at the time of application and at the time of this decision, the parties are committed to a shared household.

39. *Social aspects of the relationship*

40. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
41. In an undated statement by Sillaman Abraham received by the Tribunal on 5 January 2023, Mr Abraham stated he visited the parties at the review applicant's grandmother's home and that the parties were always together even when not at home.
42. In an undated statement by Hawat Blai received by the Tribunal on 5 January 2023 Mr/s Blai stated that the parties regularly socialised together, at the movies or dining out.
43. In an undated statement by Dawit Faqadon received by the Tribunal on 5 January 2023, Mr/s Faqadon stated that the parties enjoyed going out together.
44. In her statutory declaration dated 16 November 2022 mentioned above, the review applicant stated that the parties went "clubbing" in Khartoum with her cousins and friends.
45. Although the statements by friends in Khartoum are brief, they provide individual observations of the parties' relationship. The Tribunal gives these statements some weight.
46. The parties provided independent and consistent statements to the hearing on 12 January 2023 that they socialised regularly when they were living together in Khartoum.
47. The review applicant's mother Abeba Shedi told the Tribunal hearing on 12 January 2023 that her mother, the review applicant's grandmother, had a good understanding of the visa applicant because the parties had lived with her for more than a year and had told Ms Shedi that she thought well of the visa applicant. Ms Shedi said, "my mother is very happy and she wants my daughter to have children" with the visa applicant. The Tribunal gives this evidence some weight.
48. The Tribunal notes the lack of evidence provided to the Department about the social aspects of the relationship and gives little weight to this lack of evidence.
49. The Tribunal gives great weight to the statutory declaration by the review applicant and the evidence provided by the parties to the hearing that, when the review applicant was living with the visa applicant in Khartoum they regularly socialised with friends and family.

50. In independent and consistent statements, the parties told the hearing that their wedding in January 2016 was well attended by family and friends of both parties. Subsequent to the hearing, on 17 January 2023, the parties provided to the Tribunal a series of photographs of their wedding. The photographs include bridesmaids, family and a large group of people participating in the celebrations. The Tribunal gives great weight to the evidence provided to the hearing by the parties and to the photographs provided subsequent to the hearing.
51. The Tribunal is satisfied that, at the time of application and at the time of this decision, the parties presented and present to family and friends as a married couple.

52. *The nature of the persons' commitment to each other*

53. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.
54. In her statutory declaration dated 16 November 2022 mentioned above, the review applicant stated that the parties had met at school in Khartoum and had stayed in contact after she migrated with her family to Australia in 2010. In 2015 the review applicant travelled to Addis Ababa in Ethiopia to meet the visa applicant and they travelled together to Gondar to stay with the visa applicant's family.
55. The parties were married at the visa applicant's family home in January 2016. After two months the review applicant returned to Australia in order to work and save money for a visa application. The review applicant travelled to Khartoum in January 2020 and lived with the visa applicant until March 2021 at the home of the review applicant's maternal grandmother.
56. The review applicant told the Tribunal hearing on 12 January 2023 that the visa applicant supported her emotionally during their telephone calls when she was upset about their physical separation. The visa applicant told the Tribunal that the parties support each other emotionally.
57. The review applicant's mother Abeba Shedi told the Tribunal hearing that the parties are in a committed relationship and she believes it will be a successful marriage because they have known each other since they were at school. She said, "I am happy that they love each other".
58. In the statement by Dawit Faqadon mentioned above, Mr/s Faqadon stated that he/she believes the parties are genuinely in love and "the amount of love they have for each other is out of this world". In the statement by Hawat Blai mentioned above Mr/s Blai also stated that the parties are in love.
59. The review applicant told the Tribunal hearing that the parties planned to live in a home near her family, she would like him to undertake a course to improve his English language skills and take a job in a warehouse or something similar.
60. The visa applicant told the hearing that he would do any job that was offered and the review applicant's mother, Ms Shedi, told the Tribunal that immigrants to Australia from her country are usually unskilled but are keen to work.
61. The Tribunal notes the limited evidence provided to the Department in regard to the parties' commitment to each other and gives little weight to this lack of evidence.

62. The Tribunal gives great weight to the statements by the parties and by the review applicant's mother to the hearing and some weight to the undated statements provided by friends of the parties.
63. The Tribunal is satisfied that at the time of application and at the time of this decision, the parties provided and provide companionship to each other and intend to have a long-term, spousal relationship.

64. CONCLUSION

65. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
66. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application on 2 October 2017 and at the time of this decision, the visa applicant and the review applicant:
- had and have a mutual commitment to a shared life as wife and husband to the exclusion of all others, as required by s 5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as much as possible as required by s 5F(2)(d)(i) of the Act.
67. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time of application and at the time of this decision.
68. Given these findings, the Tribunal is satisfied that, at the time the visa application was made and at the time of this decision, the parties were and are in a spousal relationship. Therefore, the applicant meets cl 309.211 and 309.221.
69. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

70. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl 309.211 of Schedule 2 to the Regulations
 - cl 309.221 of Schedule 2 to the Regulations

Cheryl Cartwright
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).